



In the Matter of:

PAUL JAYKO,

ARB CASE NO. 01-009

COMPLAINANT,

ALJ CASE NO. 99-CAA-5

v.

DATE: NOV 22 2000

**OHIO ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER GRANTING MOTION FOR STAY

Respondent Ohio Environmental Protection Agency (OEPA) has filed a motion requesting the Administrative Review Board to stay this whistleblower appeal pending resolution of an action before the United States District Court for the Southern District of Ohio, Eastern Division.¹ OEPA asked the district court, pursuant to Fed. R. Civ. P. 57, to issue a declaratory judgment "that the adjudication and/or prosecution of this case [before the Labor Department] violate Ohio's right of Sovereign Immunity and its rights under the Tenth and Eleventh Amendments and that any actions, orders, rulings, and/or findings are void and without force and effect." Complaint in *Ohio Environmental Protection Agency v. United States of America*, Case No. C2 00-1157 at 10. OEPA also requested a temporary restraining order and preliminary and permanent injunctions pursuant to Fed. R. Civ. P. 65, "ordering [the Department of Labor] to cease and desist any prosecution, adjudication, enforcement, or any other action brought against the State of Ohio" under the seven environmental acts at issue in this whistleblower appeal.² *Id.*

¹ *Ohio Environmental Protection Agency v. United States of America*, Case No. CA 00-1157.

² This case arises under - the Toxic Substances Control Act, 15 U.S.C. §2622 (1994); the Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1367 (1994); the Safe Drinking Water Act, 42 U.S.C. §300j-9(i) (1994); the Solid Waste Disposal Act, 42 U.S.C. §6971 (1994); the Clean Air Act, 42 U.S.C. §7622(a) (1994); the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (1994) and the Energy Reorganization Act, 42 U.S.C. §5851 (1995).

On November 16, 2000, the district court issued an Opinion and Order granting OEPA's request for Injunctive and Declaratory Relief. The court issued a declaratory judgment that "the regulations set forth in 29 C.F.R. Part 24 relating to claims made by individual complainants against the various States may only be applied consistent with the Eleventh Amendment according to the provisions of the Opinion and Order." The court further ordered

unless the United States of America Department of Labor elects to intervene as a party in the case of Paul Jayco, [sic] Case No. 1999-CAA-5 within thirty (30) days from the date of this Order, the Defendants are otherwise restrained from any further adjudication against the State of Ohio regarding any claims in the proceeding.

Accordingly, we **GRANT OEPA's** motion to stay these proceedings until such time as the Department of Labor intervenes in the whistleblower proceedings or the conclusion of appeals, if any, of the district court's decision. If as a result of intervention or appeal, the Board's jurisdiction to proceed is established, we will issue a new briefing schedule.

OEPA has also moved the Board for an enlargement of time to file its brief and for an enlargement of the page limitation. Given the Board's ruling on the stay motion, the request for an enlargement of time is moot. If a new briefing schedule is ultimately issued, it will include the Board's ruling on the motion to enlarge the page limitation.

Complainant Jayko has filed with the Board a Motion to Join Certain OEPA State Officials in their Official Capacity. If the Board's jurisdiction to proceed is ultimately established, we will give OEPA an opportunity to respond to the motion before we rule on it.

FOR THE ADMINISTRATIVE REVIEW BOARD:

Janet R. Dunlop
General Counsel

NOTE: Questions regarding any case pending before the Board should be directed to the Board's staff assistant, Ernestine Battle.

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